91-1186

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WALKER BENNETT MONROE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court violated the command of the Sentencing Reform Act of 1984 to avoid disparity between similarly situated defendants in determining it was powerless to depart to avoid a greater than ten-year disparity between similar defendants originally charged with and guilty of the same underlying misconduct?

2. Whether to protect the Sixth Amendment right to jury trial the district court has the duty to state the reasons for a gross unexplained sentencing disparity, more than 10 years for the one who had a jury trial, between similarly situated defendants in the same case?

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The Petitioner, Walker Bennett Monroe, requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in affirming his sentence to review: (a) the conflict among the circuits interpreting the express statutory language of the Sentencing Reform Act mandating avoidance of disparity between similarly situated defendants guilty of similar misconduct, and (b) the elimination of a judicial statement of reasons to prevent punishment for the exercise of the

right to jury trial.

OPINION BELOW

The opinion of the Court of Appeals affirmed the conviction and sentence of the petitioner and is officially reported at 943 F.2d 1007 (9th Cir. 1991). A copy of the opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On 21 August 1991 the Court of Appeals entered judgment affirming the conviction of the petitioner for conspiracy to import a multi-ton shipment of marijuana and related offenses. On 22 October 1991 his Petition for Rehearing was denied and the Suggestion for Rehearing en banc rejected. (Appendix B.) This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

The jurisdiction of the district court over this federal criminal case is 18 U.S.C. 3231.

STATUTES INVOLVED

The Sentencing Reform Act of 1984 (Pub.L. 98-473,

Tit.II, c.II, 98 Stat. 2031 (12 Oct 84)), as amended, as to the avoidance of disparity between similarly situated defendants for similar misconduct provides:

18 U.S.C. 3553(a)(6) The court, in determining the particular sentence to imposed, shall consider -- . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

28 U.S.C. 991(b)(1)(B) The purposes of the United States Sentencing Commission are to -- (1) establish sentencing policies and practices for the Federal criminal justice system that -- . . . (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. 994(f) The [Sentencing] Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness and reducing unwarranted sentence disparities.

The authority of the district court to depart from the designated Sentencing Guidelines ranges is:

18 U.S.C. 3553(b) The court shall impose a sentence of the kind, and within the range, referred to in subsection

(a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . . (Emphasis added.)

STATEMENT OF THE CASE

In October 1988 the petitioner Walker Monroe and Michael McCabe were jointly charged in a nine-count federal indictment arising from a Government controlled conspiracy that involved unsuccessful negotiations for the acquisition of ton quantities of marijuana from Thailand. McCabe never cooperated with nor testified for the Government, but because he waived his right to trial pursuant to a plea agreement he was permitted by the prosecutor to plead to a 1986 importation of marijuana charge in a superseding information that antedated the effective date of the Sentencing Guidelines and a telephone count (21 U.S.C. 843(b) - four year maximum sentence) charged in the same indictment with Monroe.

Monroe went to jury trial before a different judge and

was found guilty on eight counts of the indictment.

McCabe was sentenced for the same underlying misconduct as Monroe. McCabe's presentence report relied upon the misconduct underlying the original indictment and never referred to the conduct of the "fabricated"[1] marijuana count to which he had pled guilty. Although his sentencing judge considered the huge quantities of marijuana that were the subject of his and Monroe's indictment, McCabe was sentenced to a term of 38 months confinement on the telephone count pursuant to the plea agreement.

At sentencing before a different judge Monroe requested the court to consider the sentence of McCabe and grant a downward departure to avoid a gross disparity. The trial judge commiserated with Monroe on the unfairness of the Guidelines, but stated she was without the

[1] Although a factual basis as to the 1986 conspiracy to smuggle marijuana was made at the time of McCabe's plea of guilty, there were no facts presented in the presentence report (PSR) to describe it. Instead, the probation officer, the prosecutor, and the judge relied on the post-Guidelines conduct in the indictment with Monroe.

power to grant such a departure. The judge then sentenced Monroe to 14 years 1 month (169 months).

The court of appeals affirmed that the district court lacked the power[2] to grant such a departure to avoid sentencing disparity.

SUPPLEMENTAL STATEMENT OF FACTS

McCabe and Monroe were charged in the same indictment in each of the nine counts charging a conspiracy to import multi-ton quantities of marijuana. Count 1 was the conspiracy to import marijuana, and Counts 7, 8, and 9 were telephone counts. (CR 1; ER 1-10).[3]

[2] If the district court had determined it had the power to make some adjustment to avoid sentencing disparity of similarly situated defendants but declined to grant such a departure, that decision of the district court under the law of the Ninth Circuit, as well as most others, was unreviewable. The narrow issue presented is the power of the district court to depart to enforce the statutory language to avoid disparities. See App. A 11517, n. 10.

[3] Count 1 charged that from a date unknown up to 8 September 1988 McCabe and Monroe and others conspired to import 1,000 kilograms and more of marijuana into the United States (21 U.S.C. 952 and 960). Count Two charged during the same time period that they conspired (1) to knowingly travel in foreign commerce to promote the importation of marijuana (18 U.S.C. 1952(a)(3)) and (2) to knowingly transport monetary instruments and funds to outside the United States with the intent to promote the importation of marijuana (18 U.S.C. 1956(a)(2)(A)). This conspiracy incorporated the same overt acts as

Pretrial Proceedings and Jury Trial of Monroe.

Both Monroe and McCabe were scheduled for trial before District Judge Brewster, who in February 1989 ruled on the pretrial motions of both defendants. In April 1989 counsel for McCabe advised that a disposition had been reached. (4 Apr 89 RT 1). On 18 April 1989 Judge Brewster transferred Monroe's case to Judge Keep for jury trial. (CR 94). On that day the jury trial commenced, lasted 12 jury days and concluded with a verdict of guilty on all eight counts (1-3, 5-9)[4] on 5 May 1989.

McCabe's Plea of Guilty.[5]

Count 1.

Count 3 and 4 charged that they traveled in foreign commerce with the intent to promote the importation of marijuana and did facilitate that promotion of unlawful activity (18 U.S.C. 1952(a)(3) and 2).

Counts 5 and 6 were money laundering counts (18 U.S.C. 1956(a)(2)(A) and 2).

Counts 7, 8, and 9 (telephone counts) charged that on different days they used a communication facility, a telephone, to facilitate the importation of marijuana (21 U.S.C. 843(b) and 18 U.S.C. 2).

[4] In the pretrial stage Count 4 had been dismissed with prejudice. (21 Feb 89 RT 56-57).

[5] Before the court of appeals petitioner moved to supplement the record on appeal to include the plea and sentencing transcripts of co-defendant McCabe, his plea agreement, and his presentence report. On 22 March 1990 the court referred the request to the merits panel for

On 22 May 1989 McCabe entered pleas of guilty before Judge Brewster to a superseding information charging a conspiracy to import marijuana in September 1986 and Count 7 of his and Monroe's indictment, a telephone count. (CR 108; 22 May 89 RT 3-4) The plea was entered under Federal Rule of Criminal Procedure 11(e)(1(C) -- if after reviewing the presentence report the judge could not follow the plea agreement, the defendant would be permitted to withdraw his plea of guilty. (22 May 89 RT 6). The maximum punishment under the superseding information conspiracy to import marijuana was 15 years, a $125,000 fine, and three years special parole, and

disposition and directed those documents be obtained from the district court. The district court provided McCabe's presentence report, and petitioner's counsel furnished the plea and sentencing transcripts, the presentence report, and the plea agreement to the court of appeals. At oral argument one circuit judge questioned whether the disparity issue was properly presented to the district court, and petitioner filed post-argument motion and memorandum with citations to the record solely on the disparity issue, and on 21 March 1991 the petitioner's motion to augment the record was granted and the records with the memorandum deemed filed. The court of appeals had before it the plea and sentencing transcripts, the plea agreement, and the presentence report of McCabe when it ruled the district judge, as a matter of law, had no power to consider them.

for Count 7 (telephone count) four years and a $250,000 fine. (22 May 89 RT 8). According to the plea agreement McCabe would receive a term of confinement of 36-47 months on Count 7 and a suspended probationary sentence on the superseding information. (22 May 89 RT 9). While entering his plea of guilty McCabe testified that in September 1986 he conspired with others in Encinitas (San Diego area) to bring marijuana into the United States at Santa Barbara, California and that he helped off-load the boat. (22 May 1989 RT 10-11) As to Count 7, he admitted that he talked on the phone to Bender, the informant and principal witness for the prosecution, from Hong Kong on 30 April 88. (22 May 89 RT 12). His plea was accepted. (22 May 89 RT 14).

McCabe's Sentencing.

McCabe's presentence report described in detail his role in the conspiracy and related counts in the superseding indictment which criminal activity he initiated with Bender in the latter part of 1987 and which Monroe later

joined. (McCabe PSR 2-10). The presentence report makes no factual reference to the marijuana offense in September 1986 to which he pleaded guilty.

On 7 August 1989 Judge Brewster held the sentencing hearing and stated the phone count would be a post-Guidelines sentence and the 1986 conspiracy to import a pre-Guidelines sentence. The 1987-1988 marijuana activity charged in the indictment was conduct that was considered by both the probation officer and the sentencing judge on the telephone count. The Guidelines range at that time for a defendant with no criminal history was 6 to 12 months, but the Probation Officer, because of the large quantity of marijuana involved in the indictment with Monroe, recommended a departure to 48 months, the statutory maximum. (McCabe PSR 18). Judge Brewster noted that the plea agreement of a range of 36 to 47 months was a stipulation by both sides for an upward departure and was based upon the immense amount of marijuana. (7 Aug 89 RT 4-5).

McCabe had never cooperated nor provided "substantial assistance" to the Government. However, the prosecutor noted that the informant Bender was a long standing friend of McCabe and would be testifying against him. (7 Aug 89 RT 8-9). The prosecutor stated the real justification for the plea agreement was McCabe's early acknowledgement of guilt and Monroe's demand for a jury trial:

> But, more importantly, your Honor, Mr. McCabe, through Mr. Pancer [defense counsel], at the gitgo, right from the very beginning, after this case has been indicted, was in my office looking to dispose of this matter, knowing that there had been -- that he was wrong, that he had committed offenses, was willing to come in, plead out, take his lumps right away, but this is at a time when the co-Defendant, Walker Bennett Monroe, did not choose to dispose of the matter, was stringing the case along. (7 Aug 89 RT 9).

The prosecutor represented that an upward departure to 46 months was warranted. The basis for the departure recommendation was the misconduct he shared with Monroe and not the misconduct to which he had pled

guilty: "this conspiracy involved the conspiracy to import multi-ton quantities of marijuana in this country from Thailand. This defendant's role in the conspiracy was such that he was the person who had the source of supply in Thailand and was doing the arrangements from Thailand. He was also responsible for having to accumulate the money in Thailand to pay for the marijuana...." (7 Aug 89 RT 11). In addition to the 46 months, the prosecutor sought a $25,000 fine on Count 7. On Count 1 he asked for a period of consecutive probation-- 15 years suspended and McCabe placed on probation for five years. (7 Aug 89 RT 12).

On Count 7 Judge Brewster found an upward departure for the extraordinarily large amount of marijuana and imposed 38 months confinement, one year supervised release, and a $25,000 fine. (7 Aug 89 RT 15). On Count 1 the court imposed seven years custody and a three-year special parole term, which was suspended and the defendant placed on probation for five years. The court imposed

a consecutive $25,000 fine, payable forthwith. (7 Aug 89 RT 17). The court permitted the defendant to self-surrender at the institution designated by the Bureau of Prisons. (7 Aug 89 RT 18).

Monroe's Sentencing.

In a sentencing memorandum (CR 128) filed before sentencing petitioner's trial defense counsel specifically urged the application of 18 U.S.C. 3553(a)(6):

> The court, in determining the particular sentence to be imposed, shall consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct...." (CR 128:2; ER 12).

McCabe was a defendant with a similar record and involved in conduct identical, if not more serious,[6] to that of the petitioner. (CR 128:2; ER 12). Sentencing policies must "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of

[6] The probation officer made a finding of 14-20 tons marijuana as McCabe's involvement, which was not challenged. However, Judge Keep based upon objection as to the amount of marijuana made a finding of six tons of marijuana as the basis of Monroe's involvement.

similar criminal conduct...." 28 U.S.C. 991(b)(1)(B). (CR 128:2-3; ER 12-13). Another section, 28 U.S.C. 994(f) states:

> The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities. (CR 128:3; ER 13).

Monroe's criminal conduct was committed in a conspiracy with three others: Bender, Cunnison, and McCabe. Bender was a cooperating individual, and Cunnison was never charged. (CR 128:3; ER 13). McCabe with a similar record received a prison term of 38 months. (CR 128:3-4; ER 13-14) Monroe was not involved from the outset. (CR 128:5; ER 15). Defense counsel concluded in his memorandum to the court:

> It therefore is clear that a primary Congressional objective of the major overhaul of Federal sentencing practices reflected by their creation of the Sentencing Commission is to eliminate the injustices and abuses reflected in disparate sentences. If there is a

> defendant who has a similar record to Mr. Monroe and is factually, if not legally, guilty of similar conduct and has been sentenced, that sentence is a crucial factor which must be considered in Mr. Monroe's sentencing per 18 U.S.C. 3553(a)(6). (CR 128:3; ER 13).

On 25 and 28 September 1989 Judge Keep conducted Monroe's sentencing hearing. Defense counsel objected to statements in the presentence report, requested reductions of the base offense level because of adjustments, and requested departures, all of which were countered by the prosecutor. (25 Sep 89 RT 47-161).

On 28 September 1989 Judge Keep made her findings on the sentencing issues. The court found for purpose of the sentencing guidelines the object of the conspiracy was six tons of marijuana. (28 Sep 89 RT 4-5). There would be no increase in the offense level for grouping because of the interrelationship of the conspiracy count and the racketeering and money laundering counts. (28 Sep 89 RT 5). The court imposed an increase of two levels for Monroe's role in the offense (3B1.1(c)). (28 Sep 89 RT

5-7). The court gave him a decrease of two levels for acceptance of responsibility. (28 Sep 89 RT 7-8) The court refused a decrease of three levels due to the likelihood of failure of the venture. (28 Sep 89 RT 8-11). The court stated:

> [B]ased upon the hard evidence of the case, I cannot find that the transaction was aborted for any reason, other than the arrest of the co-Defendants, and I do not make any finding that there was -- the plan was improbable or unlikely to be successful. (28 Sep 89 RT 10-11).

The court refused a two-level downward departure for humanitarian concerns because of the death of Monroe's father, brother, and girlfriend during the case. (28 Sep 89 RT 11-13). The court found his adjusted base level to be 34, Criminal History I, for a resulting range of 151-188 months. (28 Sep 89 RT 14).

Defense counsel represented to the court that he had consulted counsel for McCabe, and McCabe had not

cooperated with the Government.[7] (25 Sep 89 RT 134-5). When defense counsel requested Judge Keep to consider the sentence of McCabe in sentencing Monroe to implement the Congressional mandate to insure parity and equivalence of sentence among similarly situated defendants, the court declined because it believed it could not do a comparative analysis of the two sentences. (25 Sep 89 RT 132, 136). Judge Keep stated:

> I know of nothing under the law that would say I can depart downward because of a sentence that another Defendant got under circumstances over which I have no control nor do I understand. (25 Sep 89 RT 134).

Judge Keep, as a matter of law refused to consider McCabe's sentence as grounds for departure regardless of the circumstances (25 Sep 89 RT 135), and imposed a

[7] If McCabe had provided substantial assistance to the authorities, a downward departure would have been possible (Sentencing Guidelines §5K1.1). If McCabe cooperated and Monroe did not, their situations may not have been so comparable.

sentence she believed "awful" and "unjust."[8]

The court then imposed 169 months (14 1/12 years) as the mid-range sentence. (28 Sep 89 RT 14). The court found him unable to pay a fine, the costs of supervision or incarceration and imposed a five year term of supervised release. (28 Sep 89 RT 15).

Similarity of Record and Offense Misconduct.

Monroe and McCabe had "similar records" because each had criminal history computation under the Guidelines of zero, which placed them in Category I, the lowest category. (McCabe PSR 11; Monroe PSR 14).

Because the probation officer apparently relied on the agents reports setting forth the misconduct in the nine-

[8] Although the sentencing judge felt powerless to consider a departure, the judge appeared to be sympathetic to the defense request: "[T]o the extent that I think a lot of the appeal that he's made is -- in his papers and the material that's been filed -- is essentially right. In my opinion, this result is awful. This is unjust. And he's tried to work as best he can within the guidelines by saying it's unjust." (25 Sep 89 RT 139).

count indictment,[9] the description of the offense "conduct," relied upon by both judges, was virtually identical for both McCabe and Monroe.[10] McCabe's presentence report described in detail his involvement in the same charged misconduct with Monroe, but failed to make any reference to the misconduct to which he pled guilty, the 1986 marijuana smuggling conspiracy. The presentence report of McCabe referred only briefly and summarily without any underlying factual information to the 1986 conspiracy to import marijuana of the superseding information. (McCabe PSR cover and p. 1). Even though McCabe pled guilty only to Count 7 (a telephone count) of the indictment in which he was charged with Monroe, the probation officer

[9] The probation officer noted that "the circumstances of these offenses has been gleaned from information contained within the Assistant U.S. Attorney's files and discussions with him and the case agent." (McCabe PSR 1).

[10] From page two through ten of both McCabe's and Monroe's presentence report the description of the offense conduct is identical, starting with the first paragraph on page two introduced with the sentence beginning: "During the latter months of 1987 . . . ." and ending on page ten with the paragraph beginning: "Found in Monroe's 1986 BMW . . . ."

used the Guidelines to calculate not only that count but all of the eight counts of which Monroe was found guilty. (McCabe PSR 17). Because the probation officer found McCabe's involvement in the same marijuana conspiracy as Monroe to be 14 to 20 tons, he recommended a term of five years confinement on old law conspiracy charge. (McCabe PSR 18-19). When McCabe was interviewed by the probation officer he explained the factual basis for the Count 7 (the telephone count), but refused to discuss the conspiracy to import marijuana and "stated that he did not feel that the conspiracy was 'justifiable.'" (McCabe PSR 10).

REASONS FOR THE ALLOWANCE OF THE WRIT

A. THERE IS CONFLICT AND DISARRAY OF THE CIRCUITS ON THE POWER OF THE DISTRICT COURT TO DEPART TO AVOID GROSS SENTENCING DISPARITY FOR SIMILARLY SITUATED DEFENDANTS THAT SHOULD TO BE RESOLVED BY THIS COURT.[11]

The court below held that the district court was

[11] On 9 December 1991, this court granted certiorari in **United States v. Wade**, 936 F.2d 169 (4th Cir. 1991), Sup. Ct. No. 91-5771, which reviews the power of the district court absent a motion from the prosecution to depart from a Guidelines sentence because of the defendant's cooperation with the Government.

without power to grant a departure to avoid disparity because of the sentence imposed on a co-defendant with a similar record and charged with the same underlying conduct in the same case. (App. A 11516-11518). The Ninth Circuit expressly relied on two of its own decisions and cited "**United States v. Sanchez-Soliz**, 882 F.2d 693, 699 (9th Cir. 1989) (rejecting argument that § 3553(a)(6) bars sentencing disparity between codefendant who pleaded guilty and codefendant who stood trial)."[12] (App. A 11517).

The disarray among the circuits arises out of a misunderstanding of the court's duty to avoid disparity and

[12] Sanchez received an eight-year term of confinement and his co-defendant a five-year term, a difference of three years. The court of appeals was unaware of the circumstances of the co-defendant's sentencing (882 F.2d at 699). Here, the court below had both the sentencing records of Monroe and McCabe. See note 5. The court in **Sanchez** stated categorically: "[W]e do not believe that any Guidelines-mandated sentence that Sanchez receives could be the product of unfair disparity." 882 F.2d at 699. Because the Guidelines are not perfectly capable of addressing every situation, judges are given a limited discretion to use departures. The departure represents the essence of American democracy in the diffusion of power among the three branches of Government ("checks and balances"), and Congress intended that the limited power of departure be available to judges to prevent a grossly disparate application of the Guidelines.

the relief sought. The court below characterized the request for consideration of the gross disparity as a request for "equalization." (App. A 11518). The petitioner did not seek nor expect equalization with the 38-month sentence of Monroe, but only that the district court based on the obvious disparity grant a departure downward from 14 years.

In **United States v. Wogan**, 938 F.2d 1446 (1st Cir. 1991) the co-defendant had been sentenced on a lesser amount of drugs than considered by the court in sentencing Wogan. The district court granted a departure downward because of the same misconduct which equalized the sentences of the two defendants. The court of appeals reversed and ordered imposition of the Guideline range.

The Second Circuit has continued to assert the district court has no power to depart to avoid disparity. **United States v. Joyner**, 924 F.2d 454, 459-461 (2d Cir. 1991). See also **United States v. Rios**, 893 F.2d 479 (2d Cir. 1989) (guideline level granted a co-defendant in entirely

different circumstances is irrelevant).

The Fourth Circuit in **United States v. Daly**, 883 F.2d 313, 318-319 (4th Cir. 1989), affirmed a downward departure of 67-months to avoid disparity between co-defendants. In **United States v. Goff**, 907 F.2d 1441, 1446-1447 (4th Cir. 1990), Circuit Judge Wilkins, who also serves as the Chairman of the Sentencing Commission, noted the conflict of authorities on a departure for disparity between other circuits (Second, Fifth, and Seventh) and his own.

The Sixth Circuit clearly holds the district court has the authority to depart to avoid gross disparity. **United States v. Nelson**, 918 F.2d 1268 (6th Cir. 1990). The district court departed to almost one-fifth of the Guideline range in order to avoid disparity with co-defendants. The appellate court found disparity to be a "circumstance" sufficiently "unusual" to justify a departure, and expressly relied on the purpose of the Sentencing Reform Act to achieve uniformity and avoid unwarranted sentencing

disparities among defendants with similar records who have been found guilty of similar conduct (18 U.S.C. 3553(a)(6)). 918 F.2d at 1271. Although the court held the district court had the power to depart because of the "great disparity," it found the extent of the departure excessive because the sentencing court had not considered the Government cooperation of the other defendants and remanded for the imposition of a "reasonable" departure. 918 F.2d at 1273-1276. The petitioner Monroe presents a much cleaner question on the power to depart for disparity, for McCabe had never cooperated with the Government.

The Tenth Circuit case, **United States v. Richardson**, 901 F.2d 867 (10th Cir. 1990), cited by the court below (App. A 11518) is not comparable, because the complaining defendant received a sentence of only 13 months minus 155 days for time served. **Richardson** did not deal with a gross or great disparity.

The Ninth Circuit itself has been inconsistent on this issue. An earlier panel opinion held that a difference

between an pre-Guidelines and post-Guidelines sentencing of defendants in the same case was a basis for departure. **United States v. Ray**, 930 F.2d 1368 (9th Cir.), **cert. denied**, 111 S.Ct. 1084 (1991).[13] In **United States v. Boshell**,___ F.2d ___ (9th Cir. No. 90-30115 20 Dec 91), the court followed **Ray** and allowed a downward departure to avoid gross disparity with co-defendants sentenced pre-Guidelines. (Slip Op. 12-15). Four days later the same court in **United States v. Mejia**, ___ F.2d ___ (9th Cir. No. 91-50005 24 Dec 91) held the district court did not have power to depart downward for the purpose of avoiding unequal treatment of co-defendants.

Because of the confusion and split among the circuits on so important an issue as the judge's right to depart to avoid disparity among similarly situated defen-

[13] In the petitioner's case the court of appeals cited this case for the rule against "equalization" (App. A 11518) but failed to mention the result that permitted a downward departure from 27 to 12 years when co-defendants had received five to six-year sentences. 930 F.2d 1368, 1372-1373.

dants, this Court must resolve the question.[14]

B. TO PROTECT THE SIXTH AMENDMENT RIGHT TO JURY TRIAL THE DISTRICT COURT HAS THE DUTY TO STATE THE REASONS AS TO A GROSS UNEXPLAINED SENTENCING DISPARITY, MORE THAN 10 YEARS FOR THE ONE WHO HAD A JURY TRIAL, BETWEEN SIMILARLY SITUATED DEFENDANTS IN THE SAME CASE.

Pre-Guidelines the Ninth Circuit had held to avoid discrimination against the exercise of the right to trial by jury the district court had to explain the greater sentences for defendants who exercised their right to trial by jury. **United States v. Capriola**, 537 F.2d 319 (9th Cir. 1976), held:

[14] Although the judge's discretion has been limited, the prosecutor's discretion and control over sentence is unreviewable and creates serious disparity not anticipated by the Guidelines. Senior Circuit Judge Heaney in a concurring opinion recognized the power of the prosecutor to control the sentence and said:

> The sentences imposed on drug traffickers in the Plukey Duke cases illustrate that sentencing disparity continues to exist under the guidelines, that defendants who go to trial pay a heavy premium for their choice, and that the prosecutor largely determines the sentences of the defendant by deciding who to charge, what to charge, and when to charge. **United States v. Hammer**, 940 F.2d 1141, 1142 (8th Cir. 1991).

The power of the judge to avoid gross disparity with a departure implements the intent of Congress and would correct prosecutorial abuses causing those disparities.

> When there is substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation. A formal statement of the reasons is not necessary. The courts may easily make their explanations orally during the sentencing procedures, and these will appear in the record.
>
> We therefore conclude that there must be a remand to enable the District Court to reconsider the sentences of both appellants. If the court remains convinced that the sentences should not be substantially ameliorated, then it should state its reasons for imposing the sentences. If it concludes that it did penalize either of the defendants because he exercised his right to a trial, it should vacate the sentence and resentence the defendant, again stating the reasons for imposing the sentence. 537 F.2d 319, 321.

The need for this rule is heightened after the Guidelines, and not obviated and made inapplicable by them. See App. A. 11519. Now 18 U.S.C. 3553(c) requires the judge to state the reasons for the sentence, and the judge must state the reasons for gross disparities for those who went to jury trial to preserve the Sixth Amendment right. Within

the last month the Ninth Circuit in a Guidelines case re-articulated the principle:

> Boshell's may be such an unusual case. Boshell's case falls in a class of cases likely to arise during the first few years following the guidelines' enactment. Because the conspiracy involves pre- and post-guidelines offenses, those who were offered a plea to pre-guidelines were sentenced under laws giving the district judge more discretion. Thus, Boshell faced not only the plea bargain disparity which would require a reasoned explanation under **Capriola** to assure he was not penalized for exercising his right to go to trial, but also disparate sentencing schemes similar to those faced in **Ray**. **United States v. Boshell**,___ F.2d ___ (9th Cir. No. 90-30015 20 Dec 91) (Slip Op. 14).

To paraphrase what Justice Stewart said in **Jackson v. United States**, 390 U.S. 570, 581 (1968), by substituting "Sentencing Guideline sentence" for "death penalty":

> Our problem is to decide whether the Constitution permits the establishment of such a [Sentencing Guideline sentence], applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right to plead not guilty and to deter the exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconsti-

tutional.

The district court to uphold the Sixth Amendment right to jury trial must inquire and state the reasons for the disparities in sentences of those that go to jury trial and receive larger sentences than those who plead guilty.

CONCLUSION

Because of the split of the circuits on an important federal question and the Sixth Amendment right to jury trial, the petitioner requests that this court issue a writ of certiorari and decide the question, or in the alternative, remand the case to the Ninth Circuit for an en banc review to resolve the intra-circuit inconsistencies.

Respectfully submitted,

DATED:___ January 1992

JOHN J. CLEARY
Attorney for Petitioner
Walker Bennett Monroe

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WALKER BENNETT MONROE, *Defendant-Appellant.*	No. 89-50597 D.C. No. CR-88-0632-K OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Argued and Submitted
February 14, 1991—Pasadena, California

Filed August 21, 1991

Before: Warren J. Ferguson, Cynthia Holcomb Hall and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Hall

SUMMARY

Evidence/Criminal Sentencing

Affirming a district court judgment of conviction, the court of appeals held that although a government witness' inconsistent statements were improperly disallowed as impeachment evidence as not having been given under oath, the error was nevertheless harmless because witnesses appellant wished to call could not offer admissible impeachment testimony about

APPENDIX A

the prior inconsistent statements but only about the declarant's conduct.

Appellant Walker Bennett Monroe was convicted of conspiracy to import marijuana into the United States. Bender, a co-conspirator was arrested on unrelated drug charges and agreed to cooperate with the government. Much of the evidence at Monroe's trial came from Bender's direct testimony. The government provided Monroe with investigative reports involving illegal activities Bender had engaged in and for which he had been granted immunity from prosecution. However, the government withheld the names of certain confidential informants identified in the reports. Monroe sought to impeach Bender with these reports. Monroe moved to compel the government to disclose the names of the confidential informants so that they could be called during his case-in-chief as prior inconsistent statements to impeach, evidence of bias, and negative character witnesses on the issue of Bender's character for truthfulness and veracity. The district court denied the motion, finding the testimony cumulative and inadmissible.

[1] The district court ruling that Bender's prior inconsistent statements could not be introduced for impeachment purposes since they had not been given under oath was clearly erroneous. [2] However, the error was harmless since the trial court ruled in the alternative that the witnesses Monroe wished to call could not offer admissible testimony about Bender's prior inconsistent statements; rather their testimony involved Bender's conduct. This was inadmissible impeachment evidence. [3] Neither could the testimony establish Bender's bias. The district court properly concluded that because Bender had been granted immunity from prosecution for his prior criminal conduct he had no incentive to minimize his previous criminal acts; if anything, he had an incentive to exaggerate them. This finding was clearly supported in the record. [4] To the extent that Monroe sought testimony about specific incidents, such

testimony was properly barred as an impermissible attack on Bender's credibility under Fed. R. Evid. 608(b).

[5] The government may not vouch for the credibility of its witnesses by presenting the jury with personal assurances of the witnesses' veracity. [6] However, references to requirements of truthfulness in plea bargains do not constitute vouching when the references are in response to attacks on the witness' credibility because of his plea bargain. Here, the reference by the government to the plea agreement came only after Bender's credibility clearly had been attacked by Monroe in his opening statement. Under those circumstances, it was Monroe who created the risk that the government's reference to the truthful testimony requirement would be interpreted as an attempt to establish truthfulness and suggest verifiability.

[7] Monroe challenged his conviction on several other counts, which alleged that by participating in an attempted wire transfer of funds from this country to Hong Kong, he violated 18 U.S.C. § 1956(a)(2)(A). [8] "Transport" was not defined in the statute. Monroe argued that the statute applied only to the physical transportation of funds across the United States border. [9] However, where money is concerned, a contemporary meaning of "transport" would have to include a wire transfer, since funds are increasingly conveyed electronically. Therefore, wire transfers were covered by the statute.

[10] The desire to equalize sentences may be an impermissible basis for departure. The sentencing judge in this case properly declined to look behind another co-conspirator's plea agreement and assess the actual culpability of the defendants in refusing to depart downwardly from the sentencing guidelines to equalize Monroe's sentence. [11] In addition, since the co-conspirator was sentenced before a different judge, the sentencing judge in this case had no obligation to consider the facts of McCabe's sentencing. [12] Where a disparity in sentences given codefendants suggests that a defendant who

pleaded not guilty was being penalized for exercising his constitutional right to a trial, the reasons for the disparity must appear in the record. [13] This is only limited to situations in which a defendant's constitutional right to stand trial is implicated. [14] As Monroe was sentenced under the Guidelines and the record stated clearly the reasons given for his sentence, the court concluded that *Capriola* was inapplicable. [15] Since Monroe and his conspirators evidenced an intention and an ability to deliver the marijuana, the court rejected Monroe's contention that the court erred in concluding that they were reasonably capable of producing the amount anticipated by the conspiracy. Therefore, the district court did not err in refusing to depart downwardly from the applicable guideline range. [16] Also, there was ample evidence in the record to support the district court's finding that Monroe was an organizer or leader deserving an enhanced sentence under the Guidelines.

COUNSEL

John J. Cleary, Cleary & Sevilla, San Diego, California, for the defendant-appellant.

Edward P. Allard, III, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

OPINION

HALL, Circuit Judge:

Walker Bennett Monroe appeals his conviction following a jury trial on a variety of charges stemming from his participation in a conspiracy to import a multi-ton shipment of marijuana.[1] The district court had jurisdiction pursuant to 18

[1]Monroe was found guilty of conspiracy to import marijuana, in violation of 21 U.S.C. §§ 952, 960 & 963; conspiracy to travel in aid of racke-

U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

I

On October 28, 1988, Monroe and Michael McCabe were charged by a federal grand jury in the Southern District of California in a nine-count indictment stemming from their involvement in a conspiracy to import marijuana from Thailand to the United States.

A

The conspiracy began in mid-1987, when McCabe and Daniel Bender first discussed plans to smuggle as much as fifteen tons of marijuana from Thailand to the United States by sailboat. They were later joined by David Cunnison. Throughout the fall and winter, the three men continued to lay plans for this smuggling venture.

Unfortunately for his coconspirators, Bender was arrested by federal agents on unrelated drug charges in February 1988, and agreed to cooperate with the government. From that point on in the conspiracy he acted as a confidential government informant. Much of the evidence at Monroe's trial came from Bender's direct testimony and tapes of his monitored conversations with Monroe and McCabe.

Monroe was brought into the conspiracy in March 1988 to handle the shipping of the marijuana, since he purportedly had access to a ship. He soon reported that the ship was unavail-

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teering and launder monetary instruments, in violation of 18 U.S.C. §§ 1952(a)(3), 1956(a)(2)(A) & 371; traveling in aid of racketeering, in violation of 18 U.S.C. §§ 1952(a)(3) & 2; laundering monetary instruments, in violation of 18 U.S.C. §§ 1956(a)(2)(A) & 2; and the unlawful use of a communication facility, in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2.

able because it was under surveillance by law enforcement agencies. Two alternate plans were then discussed. Monroe proposed to ship the marijuana in sea containers, first to Mexico, and then by truck to the United States. He was to put up the money for the container shipment of marijuana and would assume responsibility for arranging safe passage through Mexico, where he claimed to have substantial influence with government officials. He would then arrange to have the marijuana shipped by truck to the United States. Monroe was said to be "gung ho" about the container venture and pressed McCabe and Bender to go along with it. Although McCabe and Bender wanted to ship the marijuana by sailboats directly to the United States, because there was enough marijuana for both plans, they agreed to the container venture while also pursuing plans to smuggle the marijuana by sailboat.

B

In late March 1988, McCabe and Bender had a number of discussions about how they would transfer the funds needed to buy the marijuana. At the government's behest, Bender volunteered the services of a "friend" who was in the money exchange business. The "friend," of course, was the Drug Enforcement Administration (DEA). On March 31, McCabe and Bender agreed to have Bender's "friend" "send" $50,000 from San Diego to Hong Kong as a test-run. On April 11, McCabe gave Bender $50,000 cash and made arrangements to pick up the money in Hong Kong a few days later from "Tony," Bender's Asian contact, who was in fact DEA Special Agent Morgan. Bender gave the $50,000 to the DEA.

On April 18, McCabe and Agent Morgan met in Hong Kong and withdrew $50,000 from a Hong Kong bank. On April 25, McCabe and Morgan again met in Hong Kong to discuss the pending transfer of $700,000 which Monroe was to give Bender in San Diego. Morgan told McCabe that the $50,000 had been wire transferred and that McCabe and the other coconspirators would be charged a commission for the

transfer. McCabe agreed that the $700,000 would also be wired transferred to Morgan, who would hold it in his Hong Kong bank until McCabe needed it. On May 9 in San Diego, Monroe gave Bender two suitcases containing approximately $695,000 in small bills to be transferred to McCabe. Bender turned the money over to the DEA. On May 27, McCabe met with Morgan in Hong Kong and withdrew $50,000 from McCabe's bank. At some point after May 31, Morgan was ordered not to release any more money to McCabe.

C

McCabe remained in the Far East until late June, making arrangements to purchase the marijuana. Monroe, meanwhile, had been arranging for its transportation through Mexico.

In early May, Monroe and Bender met to discuss the progress of the conspiracy. Their conversation was monitored by government agents. Monroe told Bender that plans were proceeding to smuggle marijuana both by container and by sailboat. Under his Mexican plan, the marijuana container would be off-loaded in Mexico and trucked directly to the United States, where an associate of his in Indiana would distribute it. Monroe claimed to have connections that would assure its safe passage through Mexican and United States customs. The Indiana distribution plans came as a surprise to Bender, who had expected that the marijuana would be shipped directly to Southern California. It was at that meeting that Monroe gave Bender the $695,000 to be sent to McCabe in Hong Kong. He also stated that he would be sending to McCabe the addresses in Mexico where the containers should be sent.

On June 29, 1988, Bender telephoned McCabe in Hong Kong. This conversation was also monitored. McCabe told Bender, "The marijuana made it from the field to a secure place where it is now being stored, waiting to be put on the container." He also indicated that once he received the rest of Monroe's money from Morgan he would get the container

"on the water right away." In a conversation monitored by the government on July 8, 1988, McCabe told Bender that "everything was fine" and "moving right along" with the container venture. McCabe and Bender met on July 13, 1988. Their conversation was again monitored. McCabe told Bender that Monroe was having difficulty with his original plan to ship the marijuana to Mazatlan, Mexico because his customs contact was not available, but that he was working on an alternate plan. He also indicated that Monroe had convinced his Mexican connections to invest in a second container. McCabe stated that he was planning to go back to Hong Kong in the near future and that except for the details of where the containers would be sent, the plan was otherwise ready to be implemented.

During the rest of July and August, there was no activity. McCabe sought Bender's help in contacting Morgan, but Bender, following DEA instructions, kept putting him off. McCabe and Monroe were arrested on September 8, 1988.

D

After their arraignment, both defendants appeared before Judge Brewster, who held a pretrial hearing on April 14, 1989. On April 18, Monroe's case was transferred to Judge Keep for jury trial. The trial lasted twelve days and concluded in a guilty verdict on all eight counts. Monroe received a sentence of approximately fourteen and one-half years.

McCabe negotiated a plea agreement with the government. Under the terms of that agreement he was sentenced by Judge Brewster for approximately three years for unlawful use of a communication facility, and was given a suspended sentence of seven years for conspiracy to import marijuana.

Monroe timely appealed.

II

Two of Monroe's allegations of error involve Bender's testimony.

A

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the government provided Monroe with investigative reports involving illegal activities Bender had engaged in and for which he had been granted immunity from prosecution. The government withheld, however, the names of certain confidential informants identified in the reports. During cross-examination, Monroe sought to impeach Bender with these reports. He then moved to compel the government to disclose the names of the confidential informants so that they could be called during his case-in-chief. He sought to offer their testimony on the following grounds: (1) as prior inconsistent statements to impeach; (2) as evidence of bias; and (3) as negative character witnesses on the issue of Bender's character for truthfulness and veracity. The district court denied his motion, finding the testimony inadmissible and cumulative.

Monroe argues that the denial of his motion was a violation of his rights under *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972).[2] We affirm the district court's ruling.

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[2]We reject Monroe's claim that the district court improperly denied the motion as untimely. The only motion deemed as untimely was Monroe's separate *Giglio* motion for in camera review of the government's reports to determine whether they contained *Brady* material relevant to Bender's credibility. R.T. 5/1/89 at 18-19. This motion was made after Bender had been cross-examined, and the district court rightly characterized it as untimely. The court nevertheless reviewed the reports for their possible *Giglio* value. *Id.*

We also reject his related claim that his rights under *Brady* were violated by the government's failure to turn over evidence prior to trial that might have been used to impeach his codefendant, McCabe, and at sentencing relevant to McCabe's role in the alleged conspiracy. "While the

In general, a district court's ruling on the prosecution's duty to produce evidence under *Brady* is reviewed de novo. *See, e.g., United States v. Pisello*, 877 F.2d 762, 764 (9th Cir. 1989); *United States v. Lehman*, 792 F.2d 899, 901 (9th Cir.), *cert. denied*, 479 U.S. 868 (1986). When, however, a district court rules on whether a defendant should have access to particular information in a government document that has been produced pursuant to *Brady*, we review for clear error. *See United States v. Strifler*, 851 F.2d 1197, 1201-02 (9th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989).[3]

[1] The district court ruled that Bender's prior inconsistent statements could not be introduced for impeachment purposes since they had not been given under oath pursuant to Fed. R. Evid. 801(d)(1)(A). R.T. 5/1/89 at 13; R.T. 5/2/89 (a.m.) at 2-3. This ruling was clearly erroneous. " 'A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness.' " *United States v. McLaughlin*, 663 F.2d 949, 952 (9th Cir. 1981) (quoting

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prosecution must disclose any [*Brady*] information within the possession or control of law enforcement personnel, it has no duty to volunteer information that it does not possess or of which it is unaware." *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir.), *cert. denied*, 471 U.S. 1139 (1985). *Brady* does not require the government to create exculpatory evidence that does not exist. *United States v. Sukumolachan*, 610 F.2d 685, 687 (9th Cir. 1980). Here, there was none. Monroe has not identified *any* information withheld by the government. In fact, his reply brief concedes that evidence to impeach McCabe might not even exist.

[3]We recognize that in cases involving the disclosure of an informant's identity, in which the government's qualified right to protect the identity of its informants is implicated, *see Rovario v. United States*, 353 U.S. 53 (1957), we have employed an abuse of discretion standard, *see United States v. Sai Keung Wong*, 886 F.2d 252, 255 (9th Cir. 1989); *cf. United States v. Phillips*, 854 F.2d 273, 277 (7th Cir. 1988) (district court's conclusion that confidential informant files did not contain *Brady* material reviewed for abuse of discretion). We need not decide whether this more deferential standard of review should apply in this case, since under either standard we would affirm the district court's ruling.

United States v. Hale, 422 U.S. 171, 176 (1975)). "The prior statements may have been oral and unsworn, and 'the making of the previous statements may be drawn out on cross-examination of the witness himself, or if on cross-examination the witness has denied making the statement, or has failed to remember it, the making of the statement may be proved by another witness.' " *United States v. Sisto*, 534 F.2d 616, 622 (5th Cir. 1976) (citation omitted).

[2] The error was harmless, however, since the court ruled in the alternative that the witnesses Monroe wished to call could not offer admissible testimony about Bender's prior inconsistent statements; rather, their testimony involved Bender's conduct. R.T. 5/2/89 at 9. The court properly found that this was inadmissible impeachment evidence. *See* Fed. R. Evid. 613 advisory committee's note (rule allowing for impeachment by prior inconsistent statements does not apply to impeachment by evidence of prior inconsistent conduct).

Monroe's second ground for admission was that the testimony of the confidential informants was relevant to establish Bender's bias. Specifically, Monroe sought to "show that Bender systematically dissembled to the government agents during the course of the debriefing and during the trial in this case in order to minimize his own criminal liability so as to obtain the rewards of a cooperation agreeement [sic]." C.R. 98 at 8.

[3] The district court concluded that because Bender had been granted immunity from prosecution for his prior criminal conduct he had no incentive to minimize his previous criminal acts; if anything, he had an incentive to exaggerate them. R.T. 5/2/89 at 6-8. This finding is clearly supported by the record. Bender's plea agreement contemplated that he would be given immunity "for any offenses [he] committed which were [then] known by the government." R.T. 4/20/89 at 72. Moreover, the jury had ample evidence of the details of Bender's plea agreement to assess his bias. *See United States v. Roberts*, 783 F.2d

767, 770 (9th Cir. 1985) (test of whether a district court improperly limited a defendant's ability to present evidence of bias is whether the jury had sufficient information to assess the witness' bias even without the excluded information); *accord United States v. Jones*, 766 F.2d 412, 414 (9th Cir. 1985).

[4] Monroe's third ground for admission was to establish Bender's character for untruthfulness under Fed. R. Evid. 608. The district court properly ruled that evidence of Bender's character for veracity would be cumulative and irrelevant, since his character for untruthfulness was "not disputed," particularly given Bender's own statements attesting to the fact "that he was a liar and a criminal for a significant portion of his adult life." R.T. 5/2/89 at 5-6. To the extent that Monroe sought testimony about specific incidents, such testimony was properly barred as an impermissible attack on Bender's credibility under Fed. R. Evid. 608(b). *See United States v. Bosley*, 615 F.2d 1274, 1276 (9th Cir. 1980).

B

Monroe alleges that the government impermissibly vouched for Bender by introducing through Bender's testimony on direct examination, the "truthful testimony" requirement of his plea agreement.[4]

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[4]The government engaged in the following colloquy with Bender:

> Q Now you also understand, Mr. Bender, and it was expressed to you and to the court, that as a part of your plea agreement, that you shall truthfully disclose all of the information with respect to the activities of yourself and others, concerning all matters about which the United States Attorneys office inquires of you?
>
> A That's correct.
>
> Q That you shall truthfully testify before the Grand Jury, and any trial or other court proceeding with respect to any matters about which the United States Attorneys office may request your testimony.

[5] The government may not vouch for the credibility of its witnesses by presenting the jury with personal assurances of the witness's veracity. *United States v. Simtob*, 901 F.2d 799, 805 (9th Cir. 1990); *United States v. Kats*, 871 F.2d 105, 107 (9th Cir. 1989) (per curiam); *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980). However, a reference to the "truthful testimony" provisions of a witness's agreement with the government does not constitute vouching if it is made in response to an attack on the witness's credibility because of his plea bargain. *Kats*, 871 F.2d at 107 (citing *United States v. Shaw*, 829 F.2d 714, 716 (9th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988)); *United States v. Dadanian*, 818 F.2d 1443, 1445 (9th Cir. 1987), *rev'd on reh'g on other grounds*, 856 F.2d 1391 (1988).

The government argues that its colloquy with Bender was not vouching because it was offered in response to Monroe's attack in his opening statement on Bender's credibility.[5] Mon-

---

A That's correct.

Q And that as a further condition, you may not commit — you must not commit any future crimes.

A That's correct.

Q You also understand that as a part of your plea agreements that should you commit any further crimes, or give any false, incomplete —

MR. IREDALE: With respect to this, your Honor, I'm going to object on the grounds of vouching.

THE COURT: Sustained.

R.T. 4/20/89 at 73-74.

[5]The government also argues that its reference to the "truthful testimony" requirements of a cooperation agreement does not, of itself, constitute vouching. It relies on *Dadanian*, where this circuit held that the admission of a "truthful testimony" clause did not constitute vouching "where the agreement was relevant to material facts at issue and the party to the agreement was subject to cross examination as to his motives." 818

roe effectively concedes that his opening statement contained an attack on Bender's credibility,[6] but argues that the Ninth Circuit has established a "bright line" rule requiring that a prosecutor "avoid[ ] vouching or at least wait[] until re-direct examination."

F.2d at 1445. Later Ninth Circuit decisions have, however, without citing *Dadanian*, analyzed the introduction of "truthful testimony" clauses in the same manner as any other form of vouching. *See United States v. Lew*, 875 F.2d 219, 223 (9th Cir. 1989); *Kats*, 871 F.2d at 107; *United States v. Wallace*, 848 F.2d 1464 (9th Cir. 1988); *Shaw*, 829 F.2d at 716-717. In *Wallace*, the panel implicitly rejected *Dadanian*'s reasoning, noting that although a witness's testimony regarding the truthfulness clause did not directly " 'portray [the government] as a guarantor of truthfulness' as directly as statements by the prosecutor himself," they leave an implication "that the prosecutor can verify the witness's testimony and thereby enforce the truthfulness condition of its plea agreement." 846 F.2d at 1473 (quoting *Roberts*, 618 F.2d at 537). Thus, contrary to the government's argument, we must consider whether its reference to the "truthful testimony" requirement of Bender's plea agreement constitutes vouching.

[6]During opening argument, Monroe's counsel described Bender's credibility as one of the two major issues the jury would have to decide upon. R.T. 4/19/89 at 85. A good portion of the opening argument is devoted to Bender, his criminal past, and the nature of his plea bargain, including allegations that Bender was paid for his testimony. Among the numerous direct attacks on Bender's credibility is the following:

> . . . The case is a complete mess. Everybody in this case is a liar. Bender lied to the agents. Michael McCabe lied to Bender. Cunnison lied to Bender. Bender lied to Walker Monroe, and to McCabe. The agent in Hong Kong lied to McCabe. McCabe lied to Bender about the agent.
>
> . . . .
>
> And the evidence will show that Bender, the man who will be the Government's chief witness, and upon whom the government's case rests, was the biggest liar of all. It will show that he lied to the agents, he lied to McCabe, he lied to Cunnison, he lied to Walker Monroe, he lied to Debbie Kagle (phonetic), Michael McCabe's girlfriend, he lied by omission, he lied by deletion, he lied with intelligence, but most of all, he lied, and *I believe he will lie*, with style.

R.T. 4/19/89 at 60-61 (emphasis added).

[6] We disagree. It is true that in most cases involving retaliatory vouching the vouching came after the witness's credibility had been attacked on cross-examination. *See Kats*, 871 F.2d at 107 (after cross-examination); *United States v. Rohrer*, 708 F.2d 429, 432-33 (9th Cir. 1983) (vouching "only after appellants' extensive impeachment of Green's motives on cross-examination and their discussion of part of the agreement"); *United States v. Brooklier*, 685 F.2d 1208, 1218-19 (9th Cir. 1982) (rebuttal following defendant's case), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Tham*, 665 F.2d 855, 862 (9th Cir. 1981) (rebuttal following defense's closing argument attacking witness' credibility), *cert. denied*, 456 U.S. 944 (1982). There is, however, no bright-line rule. In *Shaw*, we simply stated the rule as follows: "We have made it clear that references to requirements of truthfulness in plea bargains do not constitute vouching when the references are in response to attacks on the witness' credibility because of his plea bargain." *Shaw*, 829 F.2d at 716. Here, the reference to the agreement came only after Bender's credibility clearly had been attacked by Monroe in his opening statement. Under those circumstances, it was Monroe who created the risk that the government's reference to the truthful testimony requirement "will be interpreted as an attempt to establish truthfulness and suggest verifiability." *Id.* at 717.

We conclude that because the government introduced the "truthful testimony" aspects of Bender's plea agreement only after Monroe had attacked Bender's credibility, it did not vouch for its witness.[7]

[7]Any vouching that occurred was, in any event, harmless beyond a reasonable doubt. *See United States v. Browne*, 829 F.2d 760, 766 (9th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988). The prosecutor's reference to Bender's agreement was brief and nonrecurring. It was cured by the court's instruction that the jury should scrutinize the testimony of an "informer" or "immunized witness" with greater caution than that of an ordinary witness. *See Simtob*, 901 F.2d at 806; *Kats*, 871 F.2d at 107; *Shaw*, 829 F.2d at 718; *Brooklier*, 685 F.2d at 1218-19; *Tham*, 665 F.2d at 862.

III

[7] Monroe challenges his convictions under Counts Two, Five, and Six, which allege that by participating in the attempted wire transfer of funds from San Diego to Hong Kong, he violated 18 U.S.C. § 1956(a)(2)(A) by "knowingly and intentionally transport[ing] and attempt[ing] to transport monetary instruments and funds ... from a place in the United States to and through a place outside the United States." He challenges both the applicability of the statute to his conduct and the sufficiency of the evidence supporting his conviction.

The interpretation of a statute is a question of law which is reviewed de novo. *Callejas v. McMahon*, 750 F.2d 729, 730 (9th Cir. 1984). As to Monroe's sufficiency argument, there is sufficient evidence to support a conviction if, reviewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Marabelles*, 724 F.2d 1374, 1377 (9th Cir. 1984).

A

At the time of Monroe's indictment, § 1956(a)(2) provided in part,

> (2) Whoever *transports* or attempts to transport a *monetary instrument* or *funds* from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
>
> > (A) with the intent to promote the carrying on of specified unlawful activity; ...
> >
> > ....

> shall be sentenced to a fine of $500,000 or twice the value of the monetary instrument or funds involved in the transportation, whichever is greater, or imprisonment for not more than twenty years, or both.

Pub. L. No. 99-570, § 1351, 100 Stat. 3207, 3207-18 (1987) (emphasis added). The statute was amended in 1988 to apply to the actual or attempted "transport[ation], transmi[ssion], or transfer[ence]" of monetary instruments or funds. Pub. L. No. 100-690, § 6471(b), 102 Stat. 4378 (1988).

[8] "Transport" is not defined in the statute. Monroe argues that given the ordinary meaning of the term, to "carry" or "convey" from one place to another, Congress intended § 1956(a)(2) to apply only to the physical transportation of funds across the United States border. *See* Strafer, *Money Laundering: The Crime of the '90's*, 27 Am. Crim. L. Rev. 149, 163-4 n.86 (1989) (citing numerous dictionary definitions in support of this argument).

[9] We believe, however, that where money is concerned, a contemporary meaning of "transport" would have to include a wire transfer, since funds are increasingly "conveyed" electronically. The Second, Third, and Eleventh Circuits reached this conclusion in interpreting the meaning of "transport" in 18 U.S.C. § 2314. Section 2314, at the time it was considered by those courts, prohibited an individual from "transport[ing] in interstate or foreign commerce . . . money . . . knowing the same to have been stolen . . . ." 18 U.S.C. § 2314 (1982). Finding that wire transfers were clearly covered by the statute, the Second Circuit stated,

> The question whether the section covers electronic transfers of funds appears to be one of first impression, but we do not regard it as a difficult one. *Electronic signals in this context are the means by which funds are transported.* The beginning of the transaction is money in one account and the ending

> is money in another. The manner in which the funds were moved does not affect the ability to obtain tangible paper dollars or a bank check from the receiving account.

United States v. Gilboe, 684 F.2d 235, 238 (2d Cir. 1982) (emphasis added), *cert. denied*, 459 U.S. 1201 (1983); *see also United States v. Goldberg*, 830 F.2d 459, 467 (3d Cir. 1987) ("It is a fact of life in today's highly computerized and technological society that transfers of money between accounts are generally accomplished electronically."); *accord United States v. Wright*, 791 F.2d 133, 136 (10th Cir. 1986). We adopt the reasoning of these courts in analyzing § 1956, and conclude that an international wire transfer constitutes the "transport[ation]" of "funds" for purposes of subsection (a)(2).[6]

In construing the statute, the district court considered the 1988 amendment, finding that it was intended to clarify Congressional intent that "transport" include a "transfer" or "transmission" of funds. A subsequent amendment to a statute "may serve to clarify, rather than change, the existing law." *Callejas*, 750 F.2d at 731 (citation and quotation omitted). That amendment and its legislative history, though not controlling, are entitled to substantial weight in construing the earlier law. *In re Adams*, 761 F.2d 1422, 1426 (9th Cir. 1987); *May Department Stores Co. v. Smith*, 572 F.2d 1275, 1278 (8th Cir.) (per curiam), *cert. denied*, 439 U.S. 837 (1978).

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[6]This interpretation is also necessary to avoid rendering a portion of subsection (a)(2) mere surplusage. *See United States v. Merhrmanesh*, 689 F.2d 822, 829 (9th Cir. 1982) (courts "may not construe a statute so as to make any part of it mere surplusage"). Subsection (a)(2) precludes the transportation of both "funds" and "monetary instruments." In § 1956(c)(5), Congress provided an exhaustive definition of "monetary instruments" which includes cash, checks, and other tangible instruments — in short, everything that one can *physically* carry. "Funds" must therefore have an independent significance. As Congress recognized in § 1956(c)(4), "funds" may be moved by "wire or other means." It follows that the "transport[ation]" of "funds" for purposes of subsection (a)(2) would include a wire transfer.

The legislative history of the 1988 amendment makes clear that Congress intended to clarify pre-existing law. Section 6471 of the Anti-Drug Abuse Act of 1988 explicitly states

> Section 6471(b) would clarify that the term "transports" in the money laundering statute was intended [to] include electronic and other forms of movement of funds other than physical transportation.

134 Cong. Rec. S17367 (daily ed. Nov. 10, 1988) (section-by-section analysis of Anti-Drug Abuse Act).[9]

Given the contemporary meaning of "transportation" of funds and the clear declaration of Congressional intent in the 1988 amendment, the district court properly found that § 1956(a)(2) applied to wire transfers. Contrary to Monroe's contention, there was no ex post facto violation. *See United States v. Tapert*, 625 F.2d 111, 120-21 (6th Cir.) (applying subsequent amendment to affirm felony conviction), *cert. denied*, 449 U.S. 952 (1980)).

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[9]Congressional intent to clarify, rather than change the statute is amplified by the fact that Congress, in § 7057(a) of the Act, made an identical amendment to 18 U.S.C. § 2314 to codify the *Gilboe*, *Wright*, and *Goldberg* decisions. The legislative history of that amendment states:

> Section 7057(a) is designed to codify appellate court holdings that 18 U.S.C. 2314 is not limited to the physical transportation of stolen or fraudulently acquired money or property but also extends to the situation in which such proceeds are transmitted or transferred electronically in interstate or foreign commerce. . . . [T]hree courts of appeal have recently rejected contentions that section 2314 is limited — because of the use of the verb transports — to instances of physical asportation of money. [citations omitted]. No contrary ruling exists. Nevertheless, in order to clarify the statute and avoid future litigation, it seems appropriate to add verbs — "transmits" and "transfers" — that clearly reach acts of electronic movement of money.

134 Cong. Rec. S17370 (daily ed. Nov. 10, 1988).

B

Monroe argues that even if a wire transfer constitutes a violation of § 1956(a)(2), there was insufficient evidence to establish that he and his coconspirators attempted to do so.

The indictment charged that Monroe and his coconspirators conspired to transport or attempt to transport funds from the United States to Hong Kong (Count Two) and that they attempted two such transportations: $50,000 on April 11 (Count Five) and approximately $695,000 on May 9 (Count Six).

Monroe challenges only the sufficiency of the evidence that he and his coconspirators attempted to transfer funds by wire. He claims that they instead agreed to what he calls a "money exchange," where payment of funds in San Diego would create a credit in Hong Kong that could be contractually enforced.

While there was some discussion of a non-wire-transfer exchange, there is ample evidence of an attempt to transfer funds by wire. This includes the March 31 McCabe-Bender agreement to "send" funds and McCabe's April 25 discussion with Morgan in which McCabe was told that the $50,000 had been wire transferred, that Morgan would charge a "service charge," and in which McCabe agreed that the second payment would likewise be wire transferred.

IV

Monroe alleges a number of errors at sentencing. We find no merit in any of his contentions.

A

He first argues that the district court erred in refusing to depart downwardly from the sentencing guidelines to equalize

his sentence with McCabe's.[10] He claims that under 18 U.S.C. § 3553(a)(6),[11] the court was obligated to sentence Monroe so as to avoid a disparity with the sentence given McCabe since, according to Monroe, McCabe was a "similarly situated defendant."

Monroe's argument fails on several grounds. First, McCabe and Monroe were not "similarly situated," as they were not found guilty of the same offenses. Monroe was convicted on eight counts relating to the drug operation, *see supra* note 1, whereas McCabe was convicted on only two counts, the unlawful use of a communication facility and conspiracy to import marijuana. Judge Keep was therefore justified in refusing to consider the circumstances of McCabe's conviction. *See United States v. Changa*, 901 F.2d 741, 744 (9th Cir. 1990) (trial judge justified in treating codefendants differently because they were convicted of different crimes); *United States v. Rios*, 893 F.2d 479, 481 (2d Cir. 1990) ("The guideline level granted a co-defendant in entirely different circumstances is irrelevant in determining appellant's guideline level."); *United States v. Sanchez-Solis*, 882 F.2d 693, 699 (2d Cir. 1989) (rejecting argument that § 3553(a)(6) bars sentencing disparity between codefendant who pleaded guilty and codefendant who stood trial).

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[10] While we lack jurisdiction to hear an appeal from a district court's discretionary decision to depart downward from the guidelines, *United States v. Morales*, 898 F.2d 99, 101 (9th Cir. 1990), where, as here, the district court indicated that it lacked the power to depart, an appeal may be had, *id.* at 102 n.2.

[11] The court, in determining the particular sentence to be imposed, shall consider—

. . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

18 U.S.C. § 3553(a)(6) (1988).

[10] Second, our cases suggest that the desire to equalize sentences may be an impermissible basis for departure. *See United States v. Ray*, 930 F.2d 1368, 1372 n.7 (9th Cir.) (desire to equalize punishment among codefendants who are all sentenced under the Guidelines is an impermissible concern), *cert. denied*, 111 S.Ct. 1084 (1991); *United States v. Carpenter*, 914 F.2d 1131, 1135-36 (9th Cir. 1990) (rejecting the principle that the Guidelines require equal sentences); *United States v. Enriquez-Munoz*, 906 F.2d 1356, 1258-60 (9th Cir. 1990) (suggesting that the Guidelines do not permit upward departure for purposes of equalizing sentences among codefendants). Judge Keep properly declined to "look behind [McCabe's] plea agreement[ ] and assess the actual culpability of the defendants." *Enriquez-Munoz*, 906 F.2d at 1359.

[11] Finally, since McCabe was sentenced before a different judge, Judge Keep had no obligation to consider the facts of McCabe's sentencing. As the Tenth Circuit observed in a similar situation in which a defendant complained of a lesser sentence given a coconspirator by a different judge,

> We are loathe to conclude the district court violated the law in imposing a sentence upon Richardson within the appropriate guideline range where the lighter sentences of his coconspirators either arise out of a different court or from different laws.

United States v. Richardson, 901 F.2d 867, 869 (10th Cir. 1990). We agree with the reasoning of the Tenth Circuit and consequently find no error in the court's refusal to equalize sentences.

B

Monroe argues that under *United States v. Capriola*, 537 F.2d 319 (9th Cir. 1976), a remand is necessary to assure that he was not penalized for exercising his constitutional right to a jury trial.

[12] In *Capriola*, we held that where a disparity in sentences given codefendants suggests that a defendant who pleaded not guilty was being penalized for exercising his constitutional right to a trial, the reasons for the disparity must appear in the record. *Id.* at 321. Where the record is devoid of reasons to support the disparity, a remand is necessary to permit the trial judge to either ameliorate the sentences or explain the disparity. *Id.*

[13] We have since limited *Capriola* to situations in which the defendant's constitutional right to stand trial is implicated. *United States v. Citro*, 842 F.2d 1149, 1154 (9th Cir. 1988), *cert. denied*, 488 U.S. 866 (1988); *United States v. Endicott*, 803 F.2d 506, 510 (9th Cir. 1986); *United States v. Hall*, 778 F.2d 1427, 1429 (9th Cir. 1985). "In the absence of such infringement, the *Capriola* holding need not be applied mechanically to all cases in which defendants are sentenced differently." *Hall*, 778 F.2d at 1429.

Capriola's requirement that a judge account for sentencing disparities has been limited further by the advent of the Sentencing Guidelines. Indeed, it may have been obviated by them. Since the Sentencing Reform Act requires a district court to consider the defendant's individual characteristics and circumstances, *see* 18 U.S.C. § 3553(a), and to provide a statement of reasons for imposing a particular sentence, *see id.* § 3553(c), we may presume that a sentence was calculated as the Guidelines require and not in retaliation for the defendant's decision to exercise his constitutional right to stand trial. *Accord Citro*, 842 F.2d at 1153-54 (*Capriola* applicable only where record devoid of reasons to support sentencing disparity); *Hall*, 778 F.2d at 1429 (same).

[14] As Monroe was sentenced pursuant to the Guidelines and the record states clearly the reasons given for his sentence, we conclude that *Capriola* is inapplicable.

C

Monroe argues that the district court erred in refusing to depart downwardly from the applicable guideline range under § 2D1.4(a) because it erroneously concluded that he and his coconspirators were "reasonably capable" of producing the six tons of marijuana anticipated by the conspiracy.[12] At the time of his sentencing § 2D1.4(a) provided,

> **Attempts and Conspiracies**
>
> (a) Base Offense Level: If a defendant is convicted of participating in an incomplete conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

United States Sentencing Commission, *Guidelines Manual*, § 2D1.4(a) (Oct. 15, 1988). The commentary to the guideline provided in part,

> [w]here the defendant was *not reasonably capable of producing* the negotiated amount the court may depart and impose a sentence lower than the sentence that would otherwise result.

U.S.S.G. § 2D1.4(a) comment. (n.1) (emphasis added).[13]

---

[12]He also claims that because the conspiracy was "government controlled" it could not have succeeded. He further argues that § 2D1.4 is inapplicable to "Government controlled and dominated conspirac[ies]." We decline to reach either argument, since Monroe raises both arguments for the first time on appeal. *See United States v. Smith*, 905 F.2d 1296, 1302 (9th Cir. 1990).

[13]We generally apply the version of the Guidelines in effect at the time of sentencing. *United States v. Carvajal*, 905 F.2d 1292, 1294 (9th Cir. 1990); 18 U.S.C. § 3553(a)(4). The guideline and related commentary

Whether a defendant was "reasonably capable of producing the negotiated amount" of drugs in an incomplete drug conspiracy is a factual determination which we review for clear error. *United States v. Upshaw*, 918 F.2d 789, 791 (9th Cir. 1990); *United States v. Rodriguez*, 896 F.2d 1031, 1033 (6th Cir. 1990).

At sentencing, Monroe contended that the conspiracy was a failure. He emphasized that as late as July, there were serious problems with his Mexican connections and that McCabe had been unable to obtain passage on an ocean carrier for the containers. After late July, there was "no discussion whatsoever about doing this deal." Given these logistical difficulties and the absence of any further planning, he argued that a downward departure was appropriate since the conspiracy was unlikely to succeed.

The district court properly emphasized that under the guideline commentary, the relevant consideration was not probable success but whether the conspiracy was capable of producing the amount in question. Its refusal to grant a downward departure rested on the following facts. First, Monroe had supplied McCabe with nearly $700,000, an amount sufficient to buy six tons of marijuana. Second, in late June and again in mid-July, the conspirators indicated that the mari-

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were amended November 1, 1989. U.S.S.G. App. C, ¶ 136-138 (Nov. 1, 1989). While the guideline was not substantively amended, the commentary now provides in relevant part,

> [W]here the court finds that the defendant did not *intend to produce* and was not *reasonably capable of producing* the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

Id. § 2D1.4(a) comment. (n.1) (emphasis added). We need not decide whether it is appropriate to apply the commentary in effect at the time of Monroe's sentencing or the 1989 version, since Monroe's conduct satisfies both versions.

juana purchase had been arranged and that they intended to proceed with their plan. Although, as Monroe argues, there was no further discussion of the conspiracy, Judge Keep noted that at no point after July did any member of the conspiracy indicate that it should be aborted. Since the marijuana was "in place," had been funded, and the conspirators did not evidence any intention of calling off their plan despite logistical problems, she concluded that they were "reasonably capable" of delivering six tons.

[15] These findings are clearly supported by the record. Since Monroe and his conspirators evidenced an intention and an ability to deliver six tons of marijuana, we reject Monroe's contention that the court erred in concluding that they were reasonably capable of producing that amount.

D

Monroe argues that the district court erred in increasing his base offense level under the guidelines for his role as an "organizer, manager, or supervisor" pursuant to § 3B1.1(c).[14] A district court's finding that a defendant is an organizer, leader, manager, or supervisor of the criminal activity is a

[14]That section provides in part:

> Based on the defendant's role in the offense, increase the offense level as follows:
>
> . . . .
>
> (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

U.S.S.G. § 3B1.1. Among the factors relevant to making this determination are: (1) the exercise of decisionmaking authority; (2) the nature of the participation in the commission of the offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share of the fruits of the crime; (5); the degree of participation in planning or organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others. *Id.*, comment. (n.3).

question of fact which is reviewed for clear error. *United States v. Sanchez*, 908 F.2d 1443, 1449 (9th Cir. 1990).

[16] There is ample evidence in the record to support the district court's finding that Monroe was an organizer or leader. The fact that Bender and McCabe played a leadership role in the initial phases of the conspiracy is not dispositive. The guidelines commentary notes that there can be more than one leader or organizer. U.S.S.G. § 3B1.1 comment. (n.3). Monroe played a decisive role in the decision to ship the marijuana through Mexico, rather than directly to the United States. It was he who had connections with Mexican customs officials and underworld figures who would assure transportation to the United States. He exercised decisionmaking authority as to the logistics of the shipments to Mexico and distribution in the United States. Where, as here, a defendant exercises decisionmaking authority and an organizational role, an upward adjustment under § 3B1.1 is appropriate. *See Sanchez*, 908 F.2d at 1448 (defendant supervised attempt to ship drugs across United States border and exercised decisionmaking authority); *Avila*, 905 F.2d at 298-99 (defendant's coordination of procurement and distribution of drugs supported sentencing enhancement for leadership role).

V

For the foregoing reasons, we AFFIRM, in all respects, Monroe's conviction and sentence.

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UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 89-50597
	)	
Plaintiff-Appellee,	)	88-0632-K
	)	
v.	)	ORDER
	)	
WALKER BENNETT MONROE,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: FERGUSON, HALL, AND RYMER, Circuit Judges.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35)

The petition for rehearing is DENIED and the suggestion for the rehearing en banc is REJECTED.

FILED
OCT 22 1991
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

APPENDIX B

Supreme Court, U.S.
FILED
MAR 18 1992
OFFICE OF THE CLERK

No. 91-1186

In the Supreme Court of the United States

OCTOBER TERM, 1991

WALKER BENNETT MONROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly declined to depart from the federal Sentencing Guidelines to equalize petitioner's sentence with the sentence of a co-defendant who had pleaded guilty to different charges.

2. Whether the district court improperly penalized petitioner for exercising his right to a jury trial when it imposed a higher sentence after petitioner's trial than a different judge had imposed on his co-defendant, who pleaded guilty to different charges.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, at 11497-11523) is reported at 943 F.2d 1007.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1991. A petition for rehearing was denied on October 22, 1991. Pet. App. B. The petition for a writ of certiorari was filed on January 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to import marijuana, in violation of 21 U.S.C. 952, 960, and 963; one count of conspiracy to travel in interstate and foreign commerce in aid of racketeering and to launder monetary instruments, in violation of 18 U.S.C. 371; one count of traveling in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3); two counts of laundering monetary instruments, in violation of 18 U.S.C. 1956(a)(2)(A); and three counts of using a communication facility to facilitate the commission of a drug felony, in violation of 21 U.S.C. 843(b). The district court sentenced him to a 169-month term of imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. A.

1. In the late 1980's, petitioner, Michael McCabe, and Daniel Bender were members of a conspiracy to import several tons of marijuana from Thailand to the United States. After Bender was arrested on an unrelated drug charge in February 1988, he became a confidential informant for the government. As the conspiracy developed, the conspirators decided, at petitioner's suggestion, that the marijuana should be shipped in sea containers to Mexico and then smuggled into the United States by truck. Before the marijuana was imported, petitioner and McCabe were arrested. Pet. App. A, at 11501-11504.

2. Petitioner and McCabe were charged in a nine-count indictment on various charges relating to the marijuana smuggling venture. McCabe reached an agreement with the government under Fed. R. Crim.

P. 11(e)(1)(C),[1] pursuant to which he pleaded guilty to only two counts: one of the telephone facilitation counts and an unrelated pre-Guidelines marijuana importation conspiracy count. Pet. 8. The plea agreement specified that the sentence on the telephone facilitation count would be between 37 and 46 months' imprisonment and a maximum fine of $25,000, and that the defendant would be placed on five years' probation on the conspiracy count; the plea agreement did not specify what the fine would be on the conspiracy count. McCabe Plea Tr. 9.[2] McCabe's Presentence Report calculated his Guidelines range on the facilitation count at 6-12 months' imprisonment, but recommended that the judge depart upward and impose a 48-month term of imprisonment (the statutory maximum) based on the seriousness of the other charges against McCabe, which had been dropped pursuant to the plea agreement. McCabe Presentence Report 11, 18. The report also recommended that McCabe receive a five-year suspended sentence on the conspiracy count. *Id.* at 20. The district court departed upward and sentenced McCabe, in accordance with his plea agreement, to 38 months' imprisonment and a $25,000 fine on the facilitation charge, and to five years' probation and a $25,000 fine on the conspiracy charge. McCabe Sentencing Tr. 15-18.

---

[1] Rule 11(e)(1)(C) permits the government and the defendant to reach an agreement "that a specific sentence is the appropriate disposition of the case."

[2] "McCabe Plea Tr." refers to the transcript of McCabe's plea hearing on May 22, 1989. "McCabe Presentence Report" refers to McCabe's Presentence Report. "McCabe Sentencing Tr." refers to the transcript of McCabe's sentencing hearing on August 7, 1989. Those documents were made part of the record in Monroe's case pursuant to a March 21, 1991, order of the court of appeals.

Although the government offered petitioner the same plea bargain it had offered to McCabe, petitioner rejected it. Sept. 25, 1989, Tr. 180-181.[3] At trial, the jury found petitioner guilty on eight counts of the indictment. His presentence report calculated the Guidelines sentencing range at 262 to 327 months' imprisonment, based on an adjusted offense level of 39 and criminal history category of I. Presentence Report 15.[4] Petitioner contended that petitioner and McCabe had been found guilty of similar conduct and thus should receive similar sentences. At petitioner's sentencing hearing, which was conducted by a judge other than the judge who had sentenced McCabe, the judge rejected petitioner's argument, explaining that she knew of "nothing under the law that would say I can depart downward because of a sentence that another Defendant got under circumstances over which I had no control." Sept. 25, 1989, Tr. 134. The district court then determined that petitioner's Guidelines sentencing range was 151 to 188 months' imprisonment,[5] and sentenced petitioner to 169

[3] "Sept. 25, 1989, Tr." refers to the transcript of petitioner's initial sentencing hearing on September 25, 1989. "Sept. 28, 1989, Tr." refers to the transcript of the conclusion of petitioner's sentencing hearing on September 28, 1989.

[4] The report's calculation rested on a base offense level of 36 (because the conspiracy involved more than 10,000 kilograms of marijuana), an increase of two levels based on petitioner's role in the offense, and an increase of one level under the grouping rules in Sentencing Guidelines § 3D1.4, based on petitioner's traveling in aid of racketeering and money laundering. Presentence Report 11-13.

[5] The court's calculation differed from the calculation in the presentence report, because the court found that the offense level was only 36, rather than 39. The difference resulted from the court's determinations that the evidence could establish only that the conspiracy involved six tons of marijuana

months' imprisonment, to be followed by a five-year term of supervised release. Sept. 28, 1989, Tr. 14-15.[6]

3. The court of appeals affirmed. Pet. App. A, at 11497-11523. It rejected (*id.* at 11517-11518) petitioner's argument that the district court erred in refusing to depart downward from the Sentencing Guidelines to equalize his sentence with McCabe's, noting that petitioner and McCabe were not similarly situated because they were not convicted of the same offenses. *Id.* at 11517. The court went on to note that, even if petitioner and McCabe had been similarly situated, it was not clear that the desire to equalize sentences could be a permissible basis for departure. *Id.* at 11518. Finally, the court noted that petitioner's argument was especially weak because he was sentenced before a different judge than McCabe. *Ibid.*

The court of appeals also rejected (Pet. App. A, at 11518-11519) petitioner's contention, raised for the first time on appeal, that the disparity between his sentence and McCabe's demonstrated that petitioner had been penalized for exercising his right to stand trial. Relying on the court of appeals' pre-Guidelines decision in *United States* v. *Capriola*, 537 F.2d 319 (9th Cir. 1976), petitioner argued that the court of appeals should remand the case to the district court

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(reducing the base offense level by two) and from the court's determination that the base offense level should not be increased one level under the grouping rules in Sentencing Guidelines § 3D1.4. Sept. 28, 1989, Tr. 4-5.

[6] The court explained its selection of the 169-month sentence as being in the middle of the Guidelines range. The court noted that petitioner's status as a "long-time, large-scale drug trafficker" supported a sentence at the "higher end" of the range, but that "humanitarian concerns for which I find that I cannot depart" supported a sentence at the lower end. Sept. 28, 1989, Tr. 14-15.

and require the court to enter findings that explain the disparity. The court noted that *Capriola*'s requirement that a judge account for sentencing disparities had largely been "obviated" by the promulgation of the Sentencing Guidelines, which themselves provide a statement of reasons for each defendant's sentence. Pet. App. A, at 11519. In any event, the court found *Capriola* inapplicable because "the record states clearly the reasons given for [petitioner's] sentence." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 20-26) that he was entitled to a downward departure from his Guidelines sentence to avoid unwarranted disparity between his sentence and that of his co-defendant McCabe. Petitioner's argument ignores the fact that, as the court of appeals found (Pet. App. A, at 11517), petitioner and McCabe are not "similarly situated." McCabe elected to accept the government's plea offer and was convicted on one relatively minor drug offense under the Sentencing Guidelines and on one unrelated pre-Guidelines offense. Petitioner did not accept the plea offer and was convicted on eight Guidelines offenses, several of them serious offenses. See *United States* v. *Butt*, No. 91-1227 (1st Cir. Jan. 27, 1992), slip op. 31-32 (defendants convicted of different offenses not similarly situated under Guidelines); *United States* v. *Font-Ramirez*, 944 F.2d 42, 50 (1st Cir. 1991) (defendants with different sentencing factors not similarly situated), cert. denied, 112 S. Ct. 954 (1992); *United States* v. *Rios*, 893 F.2d 479, 481 (2d Cir. 1990) (co-defendant's guilty plea constitutes different circumstances for purposes of determining Guideline sentence).

In any event, petitioner errs in suggesting (Pet. 20-26) that there is "conflict and disarray" in the circuits, based on the assertion that decisions of the Fourth, Sixth, and Ninth Circuits clearly have established the authority of district courts to depart from a Guidelines range to prevent a disparity in Guidelines sentences for similarly situated co-defendants. In fact, no court of appeals has squarely held that such a departure is appropriate. The Fourth Circuit decision on which petitioner relies (Pet. 23), *United States* v. *Daly*, 883 F.2d 313 (1989), cert. denied, 496 U.S. 927 (1990), involved an appeal by a defendant who had received such a departure, but contended that the departure was insufficient. The court of appeals stated in dictum that some departure to reduce disparity might be warranted in some circumstances, but it rejected Daly's contention that the departure he had received was inadequate. 883 F.2d at 319. Similarly, the Sixth Circuit decision on which petitioner relies (Pet. 23-24), *United States* v. *Nelson*, 918 F.2d 1268 (1990), stated in dictum that such departures might be justified in unusual cases, *id.* at 1271-1273, but it reversed the departure before it, *id.* at 1273-1275.[7] Finally, the decisions of the Ninth Circuit on which petitioner relies (Pet. 25) involved the discrete question whether such a departure is appropriate in the unusual circumstance where the co-defendant was sentenced under pre-Guidelines rules. See *United States* v. *Ray*, 930 F.2d 1368, 1372 (1990); *United States* v. *Boshell*, 952 F.2d 1101, 1108 (1991). In cases like petitioner's, involving two

[7] Moreover, the Sixth Circuit's position on this point well may be clarified, because that court has granted en banc review of a panel decision reversing such a departure, see *United States* v. *Gessa*, 944 F.2d 265 (1991), reh'g granted (Nov. 8, 1991).

defendants who both were sentenced under the Guidelines, the Ninth Circuit consistently has held such departures inappropriate. See, *e.g.*, *United States* v. *Mejia*, No. 91-50005 (9th Cir. Feb. 19, 1992), slip op. 1646-1647 & n.2 (distinguishing *Ray* on this ground); *United States* v. *Carpenter*, 914 F.2d 1131, 1135-1136 (9th Cir. 1990); *United States* v. *Enriquez-Munoz*, 906 F.2d 1356, 1358-1360 (9th Cir. 1990); see also *United States* v. *Ray*, 930 F.2d at 1372 n.7 (reaffirming *Enriquez-Munoz* in a pure Guidelines context). In any event, any tension between those decisions and the result in this case is a matter for resolution by the Ninth Circuit, not this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

2. Petitioner also claims (Pet. 26-29) that the district court failed to assure that his Sixth Amendment right to a jury trial was protected by stating reasons for imposing a different sentence on petitioner after trial than a different judge had imposed on his co-defendant. He ignores, however, the court of appeals' express finding that "the record states clearly the reasons given for his sentence." Pet. App. A, at 11519. Moreover, the court of appeals was correct in recognizing that the adoption of the Sentencing Guidelines obviates the need for such a rule. See, *e.g.*, *Font-Ramirez*, 944 F.2d at 50 ("The guidelines do not require the sentencing court to consider related cases or to justify a sentence in terms of the punishment meted out to co-defendants."); *United States* v. *Lanese*, 937 F.2d 54, 58 (2d Cir. 1991) ("Having concluded that the guidelines were properly applied, * * * we fail to see the purpose of a remand [to require the district court to explain a disparity in sentencing].").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

No. 91-1186

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WALKER BENNETT MONROE
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court violated the command of the Sentencing Reform Act of 1984 to avoid disparity between similarly situated defendants in determining it was powerless to depart to avoid a greater than ten-year disparity between similar defendants originally charged with and guilty of the same underlying misconduct?[1]

2. Whether to protect the Sixth Amendment right to jury trial the district court has the duty to state the reasons for a gross unexplained sentencing disparity, more than 10 years for the one who had a jury trial, between similarly situated defendants in the same case?[2]

[1] This question for review is repeated here, because the re-phrasing by the Government in its Brief in Opposition ("BO") mistakenly characterizes the error as the district court's "declining" to depart, when the real issue was the lack of power to depart. (Pet 5-6, 6 n.2, 20-21). Petitioner's question is directed at the avoidance of gross disparity (ten-year difference) and not equalization. (Pet 21-26).

[2] The duty to state reasons is not the same question as presented by the Government that the petitioner claimed the district court penalized him for the exercise of his right to trial by jury.

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REPLY BRIEF

The Petitioner, Walker Bennett Monroe, files this reply brief to correct the factual errors and misdirection of the issue by the Government's Brief in Opposition. The sentencing issue concerns exclusively the power of the district court to comply with the express statutory language of the Sentencing Reform Act of 1984 to avoid unwarranted disparities between defendants in the same case with similar backgrounds and convicted and sentenced on the

same conduct. The Congressional mandate was a necessary tool for the judges to achieve uniformity and fairness as a counterweight for the unchecked charging and bargaining discretion of the prosecutor. The power to depart to avoid gross disparity between similarly situated defendants is expressly conferred on sentencing judges, although they need not exercise it. The Sentencing Reform Act favors a statement of reasons for the sentence imposed, and when two defendants receive such disparate sentences for the same misconduct, a reasoned statement from the sentencing judge differentiating the two defendants so as to insure that the defendant was not sentenced more severely because he exercised his right to trial by jury is required.

STATEMENT OF THE CASE

McCabe and Monroe, petitioner, were sentenced for the same "conduct." The prosecutorial packaging did not undermine the truthful basis of both sentences -- the same marijuana transaction. McCabe did bargain and plead to

"an unrelated pre-Guidelines marijuana importation conspiracy count" (BO 3) or "fabricated" count (Pet 5). Although McCabe's exposure under this plea to the two counts was 19 years confinement (15 years for the pre-Guidelines marijuana conspiracy and four years for the Guidelines telephone count) (McCabe's PSR cover), his plea agreement which entailed no cooperation[3] limited his exposure to a range of 36 to 47 months. (22 May 89 RT 9). The transparency of the procedure was not lost on the Probation Officer who wrote McCabe's Presentence Report and expressly relied on the same misconduct that supported his joint charge with the petitioner and even calculated the offense under the Guidelines that would have resulted in a range of sentence of 262-327 months (21 5/6 years to 27 1/4 years). (McCabe PSR 17).[4]

[3] If McCabe cooperated with the Government, he may not have been similarly situated. Pet 17 n.7 In **Nelson** the court held that the district court had power to depart to avoid great disparity even when the co-defendants cooperated. Pet 23-24.

[4] It should be noted that this was the same sentence recommended by the Probation Officer for the petitioner. (Monroe PSR 21; BO 4).

The Government does not accurately characterize the sentences of McCabe and petitioner by stating: "who both were sentenced under the Guidelines...." (BO 7-8). This is a half-truth. McCabe's telephone count was under the Guidelines with a maximum sentence of 48 months, but McCabe was also sentenced for the pre-Guidelines "fabricated" marijuana conspiracy count (15-year maximum) so as to deliberately avoid the imposition of the same Guidelines sentence the petitioner faced. The bulk of McCabe's exposure was pre-Guidelines (15/19ths), and it would be more accurate to call it at least a mixed sentence or predominantly a pre-Guidelines sentence.

The joint case of petitioner and McCabe as charged in the same indictment was assigned to Judge Brewster, but he assigned the Monroe's case to Judge Keep for jury trial. (CR 94). Seven weeks after Judge Brewster sentenced McCabe, Judge Keep sentenced petitioner. (Pet 10, 15). In his sentencing memorandum and at sentencing petitioner's trial defense counsel placed heavy reliance on

the statutory provision mandating the sentencing court "to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." (18 U.S.C. 3553(a)(6)). (Pet 13-17). Defense counsel requested the court consider the sentence of McCabe in granting a downward departure to avoid gross disparity between similarly situated defendants, but the court held she had no power to depart downward and even expressed that she believed the sentence "awful" and "unjust." (Pet 17-18).

REASONS FOR THE ALLOWANCE OF THE WRIT

A. THERE IS CONFLICT AND DISARRAY OF THE CIRCUITS ON THE POWER OF THE DISTRICT COURT TO DEPART TO AVOID GROSS SENTENCING DISPARITY FOR SIMILARLY SITUATED DEFENDANTS THAT SHOULD TO BE RESOLVED BY THIS COURT.

"A major goal of the [Sentencing Reform] Act was to reduce disparity in sentencing courts through a new system in which defendants with similar characteristics who committed similar crimes received similar sentences." This statement, made by the Chairman of the Sentencing

Commission, Circuit Judge Wilkins, and the General Counsel of the Sentencing Commission, was based upon one of the statutory provisions relied upon by petitioner imposing on the sentencing courts the duty to avoid unwarranted disparity between similarly situated defendants for similar conduct.[5] Congress did not only create this lofty aspiration for the Sentencing Commission (28 U.S.C. 991(b)(1)(b)) and the Guidelines (28 U.S.C. 994(f)) but placed an affirmative, specific, and mandatory duty on the sentencing judge, because "[t]he court in determining the particular sentence to be imposed shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct." 18 U.S.C. 3553(a)(6). (Empha-

[5] Wilkins and Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495 (1990) The authors relied on 28 U.S.C. 991(b)(1)(B). **Id** n. 3. That provision articulated as a major purpose of the Sentencing Commission: "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct...." 28 U.S.C. 991(b)(1)(B). A similar provision governs Guidelines. 28 U.S.C. 994(f). The petitioner specifically relies on 18 U.S.C. 3553(a)(6)[district court responsibility to avoid such disparities]. See Pet 5-6.

sis added). In a recent decision of this court, Justice White (in dissent) restated the clear purpose of this section:

> Subsection (a)(6) -- "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" -- takes on added significance in judging the reasonableness of the extent of the departure. Congress intended appellate review under the new sentencing regime to guide and control the discretion long-reposed in the district courts towards the ultimate goal of sentencing reform: to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing. **Williams v. United States**, ___ U.S. ___, 50 Crim. L. Rptr 2080, 2087 (9 Mar 92). (Emphasis added).

The petitioner seeks the implementation of the plain meeting of the pivotal statutory basis of the Sentencing Reform Act.

Congress never intended a Procrustean scheme that could be manipulated to do injustice or create gross disparities. Although Congress restricted but did not eliminate judicial discretion, it did abolish parole, a post-sentence procedure that mitigated the terms of confinement. The Congress did nothing to restrict open-ended discretion of the prosecutor, who resolves almost 90 % of

his cases through plea bargaining.[6] Congress did create the offsetting or balancing judicial discretion in unusual cases with 18 U.S.C. 3553(b) permitting departures.[7] Congress specifically directed the sentencing court in the individual case to avoid unwarranted disparities. The courts must respect the plain meaning of the statute. **Chapman v. United States**, 111 S.Ct. 1919 (1991)(enforcement of the plain meaning of "mixture" under the Sentencing Reform Act). For the court of appeals to say the district court did not have the power to grant a departure to correct the proscribed disparity is an abandonment of a mandated judicial responsibility.

The alpha and omega of this case is the statute, 18

[6] "Nevertheless, the political power of prosecutors and the fear of swamping the courts have largely immunized plea bargaining -- the most important part of the sentencing process -- from sentencing reform. The sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors." Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. of Chi. L. Rev. 901, 926 (1991). (Emphasis added).

[7] In **Williams v. United States**, ___ U.S. ___, 50 Crim. L. Rptr. 2080 (9 Mar 92), this court reviewed the scope of appellate review of a departure.

U.S.C. 3553(a)(6), and its two complementary provisions in Title 28, sections 991(b)(1)(B) and 994(f) (Pet 3). The Government's Brief does not mention them. The court below mentioned section 3553(a)(6) in a footnote (Pet App 11517 n. 11) and then found that McCabe and petitioner were not "similarly situated," "as they were not guilty of the same offenses." (Pet App 11517)(Emphasis added). The Government also focuses on "offenses." (BO 6). The statute refers to "conduct," and the "cornerstone" of the Guidelines is Relevant Offense Conduct,[8] a basis for the assessment of punishment not limited to the charged offense but including all relevant conduct. See Sentencing Guidelines §1B1.3 Relevant Conduct (Factors that Determine the Guideline). The Sentencing Guidelines, both by statute and under the guidelines are applicable to "conduct" so that manipulation of the "offenses" would not create artificial and arbitrary categories. "Conduct" was the star

[8] See Wilkins and Steer, Relevant Conduct: The Cornerstone of the Federal Guidelines, 41 S.C.L. Rev. 495 (1990).

which the judiciary must follow, and the court below lost its heading by construing "conduct" to mean "offenses" leading to an "awful" and "unjust" result incompatible with a straight forward reading of the statute.

That the "conduct" was the same cannot be challenged, for the description of the offenses in both the Presentence Report of McCabe and that of petitioner were virtually identical. (Pet 18-20). They had "similar records" for both were in Category I with zero points. (Pet 18).

Although the Government summarized petitioner's position in its statement (BO 4), it misconstrues the issue when it stated: "Petitioner first contends that he was entitled to a downward departure from his Guidelines sentence to avoid unwarranted disparity between his sentence and that of McCabe." (BO 6). The issue, more properly as stated in petitioner's Question Presented for Review, is that the district court and the appellate court held the judge was powerless to depart to avoid a gross disparity in the case before her. (Pet i, 5-6, 17, 20-21, 22).

The court below (Pet App 11518; BO 5) emphasized that the two defendants in the same case were sentenced by different judges albeit in the same courthouse. The Sentencing Reform Act was to develop uniformity of sentencing to avoid disparities that previously existed when defendants with similar records charged with similar conduct received substantially different sentences because of the particular judge before whom they appeared.[9] The broad discretion afforded under pre-Guidelines sentences made comparison between different judges impossible. The Sentencing Reform Act limited that judicial discretion so as to make the fortuitous selection of the particular judge mostly irrelevant. Judges are now to be sensitive to the sentences imposed by their brethren. The approxi-

[9] These were not defendants in different cases or in different courthouses. There is a difference from specific disparity as between the defendants in the same case, and general disparity between all defendants. The avoidance of specific disparity is the purpose and reason for the mandate ("shall") of 18 U.S.C. 3553(a)(6), and the avoidance of general disparity is the responsibility of the Sentencing Commission and the Guidelines as required by 28 U.S.C. 991(b)(1)(B) and 28 U.S.C. 994(f).

mately 30-40 minutes it would take to review a summary of the plea and sentencing proceedings and Presentence Report of McCabe, a co-defendant in the same case, would not have been an unreasonable burden for petitioner's trial judge, who heard the evidence and was familiar with the role of McCabe as well as the petitioner. It was the same prosecutor for both defendants in the same case. The minor administrative burden was not a sufficient excuse for refusing to compare two defendants in the same case in the same courthouse to avoid disparity. A different judge no longer justifies gross disparity.

Although the Government contends there is no conflict and disarray in the circuits (BO 7), it then cites the decision in **United States v. Gessa**, 944 F.2d 265 (6th Cir. 1991) (BO 7 n. 7). The panel in **Gessa** refused to follow the precedent of **United States v. Nelson**, 918 F.2d 1268 (6th Cir. 1990), which it noted had received favorable scholarly comment, because it believed it was bound by an earlier panel decision that held to the contrary. 918 F.2d at

1270.[10] The **Gessa** panel and the panel below confused the avoidance of unwarranted (gross) disparity (the language of the statute) with the concept of equalization, which concepts are both qualitatively and quantitatively different. Unwarranted disparity is a recognition that while defendants in the same case and in the same categories may not necessarily be entitled to the same sentence, gross sentence differentials must be explained. Equalization rests on the claim for the same sentences by similar situated defendants in the same case. Petitioner does not claim the right to have the same sentence as McCabe, 38 months, but seeks recognition of the district court's power to depart downward from his 14-year sentence so as to avoid unwarranted disparity with the sentence previously imposed on McCabe. The amount of the departure would

[10] The court of appeals by taking the **Gessa** case en banc vacated this opinion (944 F.2d at 271), which was a precedent inconsistent with **Nelson**.

rest with the discretion of the sentencing judge.[11]

When the Chairman of the Sentencing Commission recognized the obvious split in the circuits concerning the power of the district court to depart to avoid unwarranted disparity (Pet 23), it was not a dispute as to dicta (BO 7), but a fundamental issue under the Sentencing Reform Act that must be resolved by this court.

Prior to the decision in petitioner's case the Ninth Circuit held that a basis for departure existed to avoid unwarranted gross disparity when defendants in the same case are fortuitously sentenced both Pre- and Post-Guidelines (Pet 24-25; BO 7). The Government attempts to distinguish the applicability of that established circuit precedent to his case, because both he and McCabe "were sentenced under the Guidelines." (BO 8). To label

[11] If the district court held that it had the power of departure and chose not to exercise it or departed less that requested by the defendant, that determination under the law of the Ninth and other circuits is unreviewable. (Pet 6 n. 2). If the court granted a departure it would be subject to appellate review. 18 U.S.C. 3742(b). See **Williams**, n. 7, **supra**.

McCabe's sentence as under the Guidelines is erroneous, for although the "relatively minor drug offense" (BO 6), the phone count, was under the Guidelines, the conspiracy to import marijuana was pre-Guidelines with a 15-year maximum sentence. McCabe's real sentence was pre-Guidelines, and precisely the case in which the prior Ninth Circuit precedent should have been applied. Since the defendant was denied the application of that precedent, this Court, as an alternative to full review of the issue, should at least grant certiorari, vacate the sentence, and remand to the Ninth Circuit for consideration of the sentence in light of **United States v. Ray**, 930 F.2d 1368 (9th Cir.), **cert. denied**, 111 S.Ct. 1084 (1991).[12] This Court has a supervisory responsibility over federal courts and a responsibility

[12] Much like the Sentencing Reform Act attempts to reduce the arbitrariness of sentence because of the individual judge, the petitioner seeks due process in requiring the panel below to follow its own law of prior precedent and not have the appellate sentencing outcome arbitrarily depend upon the particular panel deciding the case. The panel in petitioner's case cited **Ray** to oppose equalization but never mentioned the result and the approval of a departure for a defendant sentenced Post-Guidelines when co-defendants were sentenced pre-Guidelines. (Pet 24-25).

for action when there exists such divided opinion in the circuit. **United States ex rel. Robinson v. Johnston**, 316 U.S. 649 (1942).[13]

B. TO PROTECT THE SIXTH AMENDMENT RIGHT TO JURY TRIAL THE DISTRICT COURT HAS THE DUTY TO STATE THE REASONS AS TO A GROSS UNEXPLAINED SENTENCING DISPARITY, MORE THAN 10 YEARS FOR THE ONE WHO HAD A JURY TRIAL, BETWEEN SIMILARLY SITUATED DEFENDANTS IN THE SAME CASE.

The Government errs when it contends that the Sentencing Guidelines obviated the need to explain the substantial difference in sentences of defendants in the same case where those who went to trial received much larger sentences. The Guidelines do not permit punishment for the exercise of the Sixth Amendment right to jury trial. The defendant who insists on the right to trial (as did petitioner) cannot be subjected to harsher punishment

[13] This is not a case of a certified question to this court as in **Wisniewski v. United States**, 353 U.S. 901 (1957)(BO 8), or a separate mandamus action requesting extraordinary relief as in **In re Blodgett**, 112 S.Ct. 674 (1992). The petitioner had filed both a request for rehearing en banc and a subsequent out-of-time request for rehearing en banc citing later precedent and again relying on **Ray**, but both were denied.

under the Guidelines than one who is similarly situated and makes a deal with the prosecutor for a basically pre-Guidelines plea and sentence. The federal courts have a supervisory responsibility to protect against such manipulation with a simple statement of reasons.

CONCLUSION

Because of the proliferating split of the circuits on an important sentencing question and the need to protect the Sixth Amendment right to jury trial, the petitioner requests that this court grant a writ of certiorari and decide the questions, or in the alternative, remand the case to the Ninth Circuit for an en banc review to resolve the intra-circuit inconsistencies or reconsideration in light of **United States v. Ray**, 930 F.2d 1368 (9th Cir. 1991).

Respectfully submitted,

DATED: 25 March 1992

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